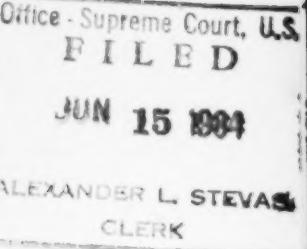


88-2151



No.

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

WILLIAM O. SKILLERN

Petitioner.

vs.

WILLIAM F. BOLGER, Postmaster  
General of the United States

Respondent.

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

IRWIN J. PRINCE  
Member of the Supreme Court Bar

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## **QUESTIONS PRESENTED FOR REVIEW**

I. Whether the Veteran's Preference, established under 5 U.S.C. §3310, confers rights superior to the rights conferred by §§504, 791 and 794 (a) of the Rehabilitation Act of 1973.

II. Whether the Rehabilitation Act of 1973 imposes an affirmative obligation upon governmental agencies to offer employment to handicapped persons otherwise qualified for such employment; and whether the Act's requirement that employers make "reasonable accommodation" of the handicapped requires consideration of handicapped applicants for all available jobs for which they may qualify.

III. Whether the U. S. Post Office carried its burden of proof below, in that no showing was made that Petitioner could not have performed satisfactorily in any of the job categories available.



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## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported and appears in the Appendix hereto. The judgment of the United States District Court for the Southern District of Indiana, unreported, also appears in the Appendix.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit was entered on August 9, 1983. This petition is timely filed in that it is filed prior to the expiration of the extension of time granted by the Clerk of the Court on April 9, 1984.

## **STATUTORY PROVISIONS INVOLVED**

**United States Code, Title 29:**

**§791 (b)**

"Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determined, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals."

### **STATEMENT OF THE CASE**

#### A. Nature of the Claim

William Skillern sought employment

with the U.S. Postal Service at Indianapolis in January, 1978. He advised the clerk in the personnel department that because he was dyslexic, he required assistance in filling out the application. He was denied this assistance; neither was he permitted to take the application home to seek aid there. (R.49-50). He tried two more times after receiving assurances from postal officials that assistance would be given him, with the same result.

(R.113)

Following the first refusal of assistance, however, Skillern and his vocational counselor were given a tour of the facility to determine whether there were any jobs he could adequately perform. Although it was agreed that the most suitable position would be that

of custodian given Skillern's expertise in that area, Skillern emphasized that he was interested in any position available. He desired the security and improved compensation offered by Postal Service employment so that he could begin expensive and lengthy remedial therapy for his dyslexia. (R.8, R.62) He expressed specific interest in the mailhandler's position since it required little reading and he had successfully held a similar job before. (R.140) Skillern's narcolepsy was controlled by medication and did not constitute a disabling condition. (R.40)

Although both Skillern and his vocational counselor were told that the custodial position was subject to the Veterans Preference Act, neither of them was told that this would be a bar to consideration of Skillern for that

position. On the contrary, they were led to believe that an exception could be made in accordance with the terms of the Rehabilitation Act.  
(R.15-16)

The Postal Service insisted then and throughout these proceedings that Skillern was best qualified for custodial work, and did not give meaningful consideration to placement in any other job category. Skillern had advised them that he was not a Veteran. During a meeting with the Postmaster, he was informed that the Postmaster personally disapproved the hiring of diabetics; no effort was made to identify a position for which Skillern could qualify through special testing and/or reasonable accommodations. (R.24, R.32)

Skillern subsequently filed a Complaint with the Equal Employment Opportunity office of the Post Office,

and, failing satisfactory resolution of the issue, filed an action in the United States District Court for the Southern District of Indiana. (R.139)

B. Course of Proceedings Below

On April 6, 1983, the United States District Court for the Southern District of Indiana entered a Ruling based upon the Federal Rules of Civil Procedure, Rule 41(b) in favor of the defendants. Although the Court acknowledged that Skillern is handicapped within the meaning of 29 U.S.C. §791 et seq., it found that he had failed to establish a prima facie case and that defendant had met its burden by articulating a legitimate non-discriminatory reason for not hiring Skillern, that being the Veterans Preference Act. The Court held that Skillern had failed to show that the reason was a pretext.

On January 18, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the lower courts decision on the grounds that, even if Skillern had made out a prima facie case, he was obligated to rebut the non-discriminatory justification for the failure to hire him. The Court declined to decide whether the Postal Service was under a duty to take Skillern's application. It further held that, although the Rehabilitation Act did not adopt the Title VII, Section 712 provision concerning Veterans' Preference laws, was obliged to impute this provision would be imputed in actions brought under the Rehabilitation Act.

C. Facts Material to the Questions

Presented

The record below confirms that the Post Office did not consider Skillern

for any position other than custodial, despite his repeated expression of interest in the mail handler's position and his representation that he had successfully held a similar position. At trial, no evidence was introduced which would support a finding that the Post Office had made any affirmative effort to match Skillern with a job he could perform. Instead, the record reflects that Skillern was considered only for the custodian position from which he was foreseeably barred by the interpretation of the Veteran's Preference Law given by Post Office officials (and later by the Seventh Circuit).

## REASONS FOR ALLOWANCE OF THE WRIT

THE DECISION BELOW CONSTITUTES A SERIOUS  
ERROR OF STATUTORY INTERPRETATION IN A  
CASE OF FIRST IMPRESSION AND INTERPRETS  
THE REHABILITATION ACT OF 1973 IN A  
MANNER WHICH CONFLICTS WITH THE DECISIONS  
OF OTHER CIRCUITS

The Writ should be granted in order to settle unresolved and significant legal issues which have wide application, and to correct substantial injustice to Petitioner and those who are similarly situated.

The Seventh Circuit Court of Appeals has ruled that the preference given to Veterans is a right and privilege superior to rights conferred upon the handicapped by the Rehabilitation Act of 1973. No precedent was cited for this ruling, and the question would appear to be one of first impression. Certainly, this Court has never addressed the issue.

Even more fundamental, however, is the question of the extent of a govern-

ment agency's duty under the terms of the Rehabilitation Act. The circuits are divided in their approach to this issue, and the related procedural issue of the appropriate burden of proof to be imposed when a complaint is tried under the Act.

The Fifth Circuit Court of Appeals has ruled that a handicapped applicant for federal employment is entitled to de novo review of an adverse administrative decision, once such applicant has exhausted his administrative remedies. Prewitt v. United States Postal Service, 662 F.2d 292 (1981). The Tenth Circuit, in a particularly well-reasoned opinion, Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (1981), held that analysis of claims arising under the Rehabilitation Act must be directed solely to the question whether the Act

has been violated; the rational basis test of equal protection is not the appropriate criterion, and absence of discriminatory intent or the presence of bad faith on the part of the employer are irrelevant. Ruling that a Plaintiff in a Rehabilitation Act case need not carry the burden of establishing "disparate treatment," the Tenth Circuit Court stated:

"The disparate treatment analysis is inapplicable to a claim under §504. ...Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." Pushkin at 1385.

The Tenth Circuit reaffirmed its holding in Pushkin in New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (1982). In New Mexico, the Court remanded the case to the district court to determine whether the State had failed to "accommodate and integrate"

handicapped children into physical education and other school programs. Implicit in the remand was the imposition of an affirmative duty to those coming within the protection of the Rehabilitation Act.

The Eleventh Circuit has likewise held that the Rehabilitation Act imposes an affirmative duty upon an employer to provide "reasonable accommodation" to a handicapped applicant for employment. In Stutts v. Freeman, 694 F.2d (1983) the Eleventh Circuit considered the claim of a dyslexic applicant for a position with the Tennessee Valley Authority. The Eleventh Circuit stated in its opinion:

"The policy underlying the Rehabilitation Act of 1973 is clear--'to promote and expand

employment opportunities in the public and private sectors for handicapped individuals'." Stutts at 668. (emphasis supplied)

The Court reasoned that Congress intended that "entities in its sphere of control" take affirmative efforts to expand employment opportunities for the handicapped, and ruled that the TVA had not satisfied its obligations by "merely" asking for the results of alternative testing methods. The Court acknowledged that Stutts had received better treatment than a non-handicapped individual; nevertheless, it held that the Rehabilitation Act requires more. According to the Eleventh Circuit, "meaningful" accommodation implies an obligation of affirmative action to place the handicapped in jobs.

The decision of the Seventh Circuit in this case is in direct conflict with these decisions of the Fifth, Tenth, and

Eleventh Circuits. The Seventh Circuit has declined to impose an affirmative obligation on the United States Post Office and has declined to require that the Post Office meet the burden of proof demanded of Defendants by the other circuits which have considered these issues.

Finally, the decisions of the District Court and the Seventh Circuit work a grave injustice upon the Petitioner. Only this Court can redress that injustice.

CONCLUSION

The Seventh Circuit's decision that the Rehabilitation Act of 1973 confers rights subordinate to those conferred by the Veterans Preference Act is erroneous. Its' decision with respect to the obligations of a governmental employer under the Act are in conflict with decisions of the Fifth, Tenth and Eleventh Circuits. For these reasons, it is respectfully urged that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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